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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931

No. 433

WILLIAM E. LAMB, PETITIONER

vs.

WILLIAM A. SCHMITT, *Receiver*, RESPONDENT.

STATEMENT OF FACTS AND BRIEF FOR RESPONDENT

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SAM C. COOK.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1931

No. 433

WILLIAM E. LAMB, Petitioner

vs.

WILLIAM A. SCHMITT, RECEIVER, Respondent

STATEMENT OF FACTS AND BRIEF FOR RESPONDENT

MAY IT PLEASE THE COURT:

This cause, No. 433 on the docket of this court, is a companion case to No. 432 on the same docket, and reference to No. 432, its records, briefs, and proceedings, is here made for a fuller understanding hereof.

The opinion of the district court is reported in 43 Fed. (2nd) 770, (R. Page 156).

The opinion of the Circuit Court of Appeals for the Fifth Circuit was rendered on April 9, 1931, and is reported in 48 Fed. (2nd) 533. (R. Page 169).

STATEMENT OF FACTS

The original bill (R. Page 1) in this cause being No. 162 on the equity docket in the district court below

was filed as an auxiliary or ancillary bill to cause No. 129 in equity in the same court.

Cause No. 129 in equity in the district court (R. Pages 7-64) and supplemental bill (R. Pages 64-78) sought to set aside alleged fraudulent conveyances and plaintiff claimed a lien on the entire estate of the defendant, Florence T. Holland. This lien was finally impressed in cause No. 129 by decree (R. Page 80). During the progress of cause No. 129 in the lower court, a petition was filed in cause No. 129 (R. Pages 99-104) seeking to make petitioner here a party to cause No. 129, and prayed; (a) to set aside conveyance to him pendente lite of part of the funds in litigation; (b) as for contempt; (c) to enjoin further transfers.

An order was entered in cause No. 129 (R. Page 104) making petitioner a party to said cause No. 129 and ordering service thereof on petitioner as (a) rule to show cause as for contempt; (b) rule to show cause why transfer should not be set aside; (c) giving notice of a temporary restraining order. Restraining order was entered by consent in cause No. 129 after service on petitioner of the citation enjoining any further transfers of any part of the estate of Florence T. Holland by her or her attorneys. Petitioner answered the ancillary petition in cause No. 129 (R. Page 116), and prayed for exoneration (R. Page 136.) Before petitioner's answer could be heard a decree was entered in the original cause No. 129 (R. Pages 78-94) which decree reserved to the district court:

> "Full jurisdiction of this cause to make such other and further orders as it may deem proper, and as equity may require, both as to increasing the amount of the estate, and/or increasing the amount due and owing to any party plaintiff, and/or uncovering additional property and disposing of any

adverse claims that may be interposed as against any portion of said estate." (R. Page 81).

"This court reserves full jurisdiction of the cause to make any other and further orders which may be, from time to time, essential for the creation, preservation, and/or disposition of the relative rights of the several parties hereto; or any claimant of any portion of the estate, now or hereafter created." (R. Page 86).

When the above decree was entered in cause No. 129 petitioner was then a party to the cause No. 129.

By the terms of said decree in cause No. 129 a receiver was appointed (respondent here) (R. Page 80) and the said receiver given the following powers and rights:

"Said receiver is hereby invested with full power and authority to institute and/or prosecute in any court of proper jurisdiction, at law or in equity, any suit or proceedings against any and all persons whomsoever seeking to recover possession and/or control and/or damages in connection with the rights hereby vested in him." (R. Page 92).

Thereupon the receiver did not join with the plaintiffs in cause No. 129 in the prosecution of their supplementary petition, but filed this cause No. 162 as an original, ancillary or auxiliary bill to enforce the decree in said cause No. 129.

Subpoena was issued in this cause No. 162 (R. Page 94) and served on the petitioner in the district and properly returned, whereupon the petitioner moved (R. Page 96) "to quash the attempted service of process on him." The said motion came on to be heard before the district court and evidence was introduced before the district

court as hereinafter stated in the argument, and the district court (R. Page 155) quashed the service of process.

The opinion of the district court appears at Pages 156-160 of the Record.

An appeal was taken by the receiver to the Circuit Court of Appeals for the Fifth Circuit where the district court was reversed. (R. Page 176). Judge Dawkins delivered the opinion of the court, which opinion is found at Pages 169-175 of the Record.

The sole question upon the appeal was whether or not petitioner, who was admittedly a non-resident attending court in a foreign jurisdiction, was under the circumstances shown by the evidence subject to service of the writ in this case.

ARGUMENT

The writ of certiorari having already been granted herein the case comes on to be heard upon the errors alleged by the petitioner to have been committed in the Circuit Court of Appeals.

In their brief in support of petition for certiorari at Page 6, under the heading "Specifications of Error" counsel for petitioner say, "The errors intended to be urged are specified under heading B, Paragraphs 3 and 4 in the petition." Turning to paragraphs 3 and 4 under heading B in the petition we find the following errors alleged to have been committed by the Circuit Court of Appeals in this case, to-wit:

> "3. The Circuit Court of Appeals erred in determining the issue of petitioner's immunity from service of process solely upon a consideration of the nature and merits of the causes of action pleaded against him, and not in determining that issue solely

upon a consideration of the reason for his presence in the district at the time the process was served."

"4. The Circuit Court of Appeals erred in reversing the judgment of the district court."

It is the rule that this court will only consider errors specifically assigned, therefore Paragraph No. 3 above is the only error assigned, since Paragraph No. 4 above is merely a broad assertion of error not specific enough to be considered.

By this more or less involved specification of error No. 3, we understand that counsel for petitioner take the position here that the Circuit Court of Appeals should have looked solely to the facts that petitioner at the time of service of process in this case upon him was a non-resident and (a) in attendance upon the court as attorney in cause No. 129; (b) a party to and under process in cause No. 129, and if those facts were true then no other circumstances ought to have been taken into consideration or looked to by the court for the reason, as petitioner contends, the rule of privilege is "absolute and inflexible."

This whole case depends upon and revolves about the question whether a non-resident attending court in a foreign jurisdiction, as a party under process or otherwise, is privileged from service under all circumstances and whether such privilege is "inflexible" and "inviolable."

It is the contention of the respondent that such rule is not "inflexible" and "inviolable" under any and all circumstances but that the rule is one of law established for the protection of the authority of the court over persons and that it is not operative when it comes in conflict with

a like rule of law established for the protection of the authority of the court over property.

The question as to the final liability of the petitioner to pay the money for which he is sued in this case is not in issue here, otherwise the respondents would be compelled to try the case on its merits in this court.

The only question which is at issue before this court is whether or not, under the circumstances of the case, the petitioner can claim the privilege of immunity from service.

This case came before the district court (as cause No. 162 on that docket) only upon the "Motion to Quash Attempted Service of Process." R. Pages 96-99, inclusive). The said motion did not and could not attempt to deny the facts set forth in the original bill, but only alleged under the six grounds of the motion, (1) (R. Page 96) the non-residence of the petitioner at the time of the service of the writ on him; (2) (R. Page 96) that at the time of the service of the writ petitioner was present in the district of service of process (the process being attached as Exhibit. R. Page 104); (3) (Rec. Page 97) that at the time of the service of process upon him petitioner was in the district as a non-resident attorney in attendance upon court; (4) (R. Page 98) that at the time of service of process upon him petitioner was on his way out of the state; (5) (R. Page 98) that petitioner had no business in the state other than his court duties in said case, and to answer said process; (6) (R. Page 98) that except for his duties as counsel and said process he would not have been in the state.

The whole motion, therefore, boiled down to its final meaning simply states that service of process on petitioner should be quashed because of his claimed privilege from such process in this cause (a) as a non-resident attorney attending court in a foreign jurisdiction in

another cause; (b) because he was under process at the time of service of the process in the instant case.

We take the position that the fact that petitioner was under process in another case added nothing to his claimed privilege of an attorney attending court in a foreign jurisdiction in the same case since if the privilege is allowable under the circumstances it is allowable in either or both cases.

Since we admit the truth of the facts set up as grounds to quash the service of process, namely, (a) that the petitioner was a non-resident attorney attending court in a foreign jurisdiction at the time of the service of the writ upon him; (b) that he was also at the time of the service of the writ upon him under process as a party (R. Page 104) we shall not go into the details of the facts supporting his grounds. We shall, however, be compelled to outline to the court the evidence introduced before the district court in this cause upon the hearing of the motion to quash the process so that this court may see exactly what the district court acted upon.

It is shown by the original bill in this cause (No. 162 in the district court; No. 6072 in the C. C. A.) (R. 1-7, inclusive) that at the time of the filing of this cause there was pending in the said district court cause No. 129 in equity, styled "Sterling B. Cramer, Plaintiff, vs. Florence T. Holland, Defendant." Reference is made to that cause No. 129. The bill states that a decree had been rendered in cause No. 129 appointing Schmitt (respondent here) receiver with power to sue; the object and the effect of the equity suit cause 129 was outlined in the bill and the charge made that petitioner, an attorney for the defendant in cause No. 129, with full knowledge of the equities, had taken out of the funds in the hands of the court in cause No. 129 approximately $70,000.00 which were trust funds by virtue of law and of said decree; that other large sums out of the said trust funds had been paid to the

defendant, the exact amount of which was not known. It was prayed that an accounting be had and taken, and general relief was asked. On the hearing of the motion to quash, the following evidence was introduced:

(a) The original bill with exhibits in cause No. 129 (R. Pages 7-64, inclusive) (Filed July 23, 1928);

(b) Supplemental bill and application for receiver. (R. Pages 64-78) (Filed January 8, 1929);

(c) Decree of the court in cause No. 129 (R. Pages 78-94, inclusive);

(d) Petition of the original plaintiffs in cause No. 129 (Rec. Pages 99-194) setting up in that cause the same facts with others that were then before the court by the original bill in this cause No. 162.

(e) The citations issued to the petitioner and others in cause No. 129 (R. Page 104).

(f) The answer of Wm. E. Lamb to the citation above in cause No. 129 (R. Page 116).

(g) The affidavit of Sam C. Cook in opposition to the motion of defendant to quash service of process (R. Page 140).

(h) Affidavit of Jos. F. Ellis (R. Page 145).

(i) Testimony of Gerald FitzGerald (R. Page 148).

(j) Affidavit of Wm. E. Lamb filed on the motion to quash (R. Page 108).

The gist of the above evidence, taken in connection with the pleadings and proceedings in cause No. 129 which were then before the court, was to this effect, namely, that cause No. 129 had been filed in equity in the District Court as a general creditors' bill to set aside alleged fraudulent conveyances between W. P. Holland

and his wife; that from time to time the cause was opened up to admit (1) the Canal Bank and Trust Company, judgment claim of $112,497.42; (2) United States Government claim of income taxes, $600,000.00; (3) various bank creditors set forth on R. Page 79, to the extent of approximately $7,000,000.00. That the original suit was filed in July, 1928, claiming that Holland had transferred his entire estate to his wife and that the said Holland was really carrying on business in the name of his wife and that as her entire estate had been fraudulently transferred to her by him it was a trust fund in her hands for the benefit of the creditors, and a lien was claimed upon the entire estate of Mrs. Holland. That petitioner knew of this and was employed in August after the bill in No. 129 was filed in July, as attorney for Mrs. Holland in said cause No. 129; that the said petitioner took up his residence (not citizenship) for seventeen months at the Holland home in the district in which No. 129 was pending. That while said cause No. 129 was pending and before it had gone to a decree, it was discovered that the defendant, Holland, and others mentioned in the petition for citation (R. Page 99) had been busily engaged in transferring the estate of Mrs. Holland into other hands, in that petitioner had gotten approximately $70,000.00 of the estate; brother-in-law Garner had gotten $100,000.00 worth of bank stock; Bank of Grenada had gotten $40,000.00 in cash, etc.; that in said cause No. 129 a citation had been issued (e, supra) (R. Page 104) to said petitioner and others and that they had been made parties to said cause No. 129, and the said petitioner had answered and submitted himself to the jurisdiction of the court in said cause No. 129 and prayed exoneration (f, supra) (R. Page 116) but that in the meantime, after the citation had been issued, a decree had been rendered in cause No. 129 declaring the estate of Mrs. Holland to be a trust fund and a lien fixed thereon (R. Page 80), and a receiver had been appointed in cause No. 129 with power to sue and that he preferred to sue in a separate suit although ancillary to No. 129;

that the money was admitted to have been received during the progress of the suit (see h, supra) (R. Page 145); (also f, supra) (R. Page 116).

With these facts before the court it was contended by the petitioner that he was privileged from service at the time the writ was served upon him, and it was contended by the respondents that since the money transferred to the said petitioner was at the time of its transfer in the constructive possession of the court and known by petitioner to be a trust fund that no immunity existed; that the district court should, without referring the parties to any other jurisdiction, try out the question of the accounting and the liability of petitioner to return into court the money received by him pendente lite. That the ultimate fact of petitioner's liability was not in issue and could not be decided upon his ex parte affidavit in cause No. 129 (said affidavit being introduced as a part of the evidence in cause No 162) (R. Page 108), the respondents having had no chance to cross examine, or to inquire into the truth or falsity of the averments; that there was sufficient evidence to show a cause of action, and it was a grave question as to his final liability for a part of the funds declared by the court to be trust funds by decree in cause No. 129 in which petitioner was at that time a party as well as an attorney, and that, therefore, the privilege or immunity from service should not be allowed to him.

In this state of the case the district court rendered his opinion. (See R. Pages 156-160, inclusive). In this opinion the district court states, (R. Page 158):

> "The motion to quash should be sustained because the defendant was exempt from the service of civil process upon him while in attendance upon court, and during a reasonable time in coming and going."

(Citing cases hereafter discussed under VI in this brief.)

In the opinion the district court further states (R. Page 159):

> "Conceding the general rule, the receiver urges the court to make an exception to it because of the auxiliary character of this proceeding."

The district court then proceeds to cite cases discussed under IV in this brief to show that while the proceeding in No. 162 is ancillary or auxiliary to No. 129 in one sense, it is original in another, and that the original rules in process and service in cases not ancillary must apply and that, therefore, the service in No. 162 was void. Nowhere in the opinion of the district court is the proposition considered which respondent sought then, and seeks now, to present to the court, to-wit: the question of the waiver of the privilege, or the estoppel of the petitioner to claim the privilege, because of the circumstances in evidence.

It is true that in the opinion (R. Page 158) the district court says:

> "There is no allegation of any misconduct **in this state** by the defendant, and no fact averred to overcome the **inference** that the alleged fees were received by him (petitioner) before he came here." (Italics ours.)

Thus the district court infers that although the subject matter of the litigation was in the district, yet if the petitioner was out of the state at the time he got the subject matter which originated in the state the situation would be changed. With due deference to the learned district judge, we except to this part of his opinion because (1) it could make no difference whether the petitioner was in or out of the district when he received the alleged trust funds if he had knowledge of the equities; (2) it was not necessary to prove that petitioner had been

guilty of any misconduct in the state. It is admitted that he got the money and that the the money was in the state and under the possession of the court at the time he got it, and that the court decreed that such funds were a part of the trust funds and declared a lien thereon from the filing of the bill and service in No. 129 (See final decree, R. Page 80). Whether petitioner got the money in the state or out of it, he got it with full knowledge of the equities, and was a taker pendente lite (See discussion in this brief under I-II), and if he was in the district at the time service was had upon him in No. 162, he was answerable therefor; (3) There was no inference to overcome in the trial of this motion to quash. The only proof offered by petitioner was his motion to quash and exhibits and affidavit (R. Pages 96-113, inclusive), and there is not one single sentence in either of these pleadings which attempts to deny the allegations of the bill in No. 162, or which attempts to extenuate the taking of the money, or which alleges that the money was received out of the state. On the contrary the evidence introduced on behalf of respondent showed that the petitioner had been continuously in the state or district for seventeen months. (See R. Page 149) The dates that he had received the money showed that it was received during that time (See affidavit Ellis, R. Pages 145-147), and that said funds were drawn from the bank in the district. This was shown by petitioner's own pleading, cause No. 129 where he appeared and attempted to exonerate himself (See R. Pages 116-136), (which pleading was introduced in evidence in cause No. 162). The petitioner in that pleading sets forth under paragraph XI (R. Page 125), how, when and where the money was paid, and upon what account it was received. Whether it was received in the manner and for the account as stated is a question to be tried upon the merits and not upon the motion to quash.

If as a matter of fact and of law the petitioner is not liable for the funds received by him pendente lite

in cause No. 129, of course he should not be held liable, but that question can be decided by no other court than the court from whose hands the funds were taken.

LEGAL ARGUMENT AND CITATION OF AUTHORITIES

I.

THE FILING OF THE CREDITORS BILL IN CAUSE NO. 129 CREATED AN EQUITABLE LEVY ON THE ENTIRE ESTATE OF FLORENCE T. HOLLAND AND THE FUNDS TAKEN BY PETITIONER, WITH FULL, ACTUAL KNOWLEDGE THEREOF, WERE AT THE TIME OF TAKING IN GREMIO LEGIS.

Section 328, Hemingway's Miss. Code of 1927.

From which we quote:

> "The creditor in such case shall have lien upon all the property described therein from the filing of his bill, except as against bona fide purchasers, before the service of process upon the defendant in such bill."

It is not necessary under the Mississippi law that any notice should be placed on the lis pendens docket.

> "The lien prescribed by Section 328, Code of 1927, Hemingway's Code, is not governed by lis pendens statute. Such a lien is given from the filing of the bill without further entry on any docket."

Lumber Co. v. Lumber Co., 85 Miss. 54.

Yates v. Council, 137 Miss. 381.

> "Upon filing a bill in equity to set aside a fraudulent conveyance, a lien is created on the prop-

erty, if properly described, regardless of the statute and actual notice of the lien is not necessary."

Miller v. Sherry, 69 U. S. 249.

"The lien will prevail as aginst a purchaser for value pending the suit."

Evans v. Welch, 63 Ala. 250.

Dillard & Coffin v. Smith, 59 S. W. 1010

27 C. J. Sec. 860.

Friedman v. Earle, 110 U. S. 710.

Metcalf Bros. v. Barker, 187 U. S. 171.

U. S. v. Pierce Oil Co., 254 U. S. 397.

"We have already seen that the filing of the bill by an execution creditor to subject the equity of the debtor in his life time created a lien and gave him a legal preference."

Marsell v. Bank, 91 U. S. 357.

In the above case, at Page 361, Justice Swain says:

"The judgment in no wise affected the trust premises until the bill was filed. That created a lien in favor of the judgment creditors. There was none before."

Ex Parte Boyd, 105 U. S. 647.

II.

DOCTRINE OF LIS PENDENS AS APPLIED TO TAKER PENDENTE LITE WITH NOTICE OF EQUITIES.

While under the statutes and decisions lis pendens notice is not necessary to bind a purchaser or taker for value and without notice, yet the petitioner, since he was

an attorney in the case, had actual notice of all the facts alleged in the original bill in cause No. 129.

Actual Knowledge Compared and Distinguished, 46 C. J. 542-43-44-45.

"A party to a transaction whose rights are liable to be injuriously affected by notice cannot willfully shut his eyes to the means of knowledge which he knows are at hand, as knowledge of such facts and circumstances as are sufficient to put a party upon inquiry, and to show that if he had exercised due diligence he would have ascertained the truth of the case, is equivalent to actual notice of the matter in respect to which the inquiry ought to have been made."

Hazelhurst v. The Lulu, 10 Wall. 192.

The above doctrine is supported by a number of cases, among others, from the Supreme Court of the United States:

Brush v. Ware, 15 Pet. 93.

Oliver v. Piatt, 3 How. 333.

Goodman v. Simonds, 20 How. 343.

The Lulu, 10 Wall 192.

Angle v. Northwestern Mut. Life Ins. Co., 92 U. S. 330.

McClure v. Oxford Tp. 94 U. S. 429.

Wood v. Carpenter, 101 U. S. 135.

Wollensak v. Reiter, 115 U. S. 96.

Simmons Creek Coal Co. v. Doran, 142 U. S. 417.

It may be contended that the property received by petitioner was not land or property, but money or nego-

tiable securities. This does not change the situation where actual knowledge of the equities is possessed by the transferee.

Lytle v. Town of Lansing, 147 U. S. 59.

Scotland v. Hill, 112 U. S. 183.

The law of lis pendens without reference to the ordinary statutes of lis pendens makes a purchaser pendente lite with knowledge of the equities liable to account.

Freeman on Judgments, 5th Ed. Vol. I, Page 9, Sections 519, 522, 523, 524, 526.

The burden of proof that he took the property pendente lite in good faith and without knowledge or notice of the equities is on the purchaser.

Smith v. Sac. County 78, U. S. (11 Wall) 139.

Stewart v. Lansing, 104 U. S. 505.

Lytle v. Lansing, 147 U. S. 62.

Orleans v. Platt, 99 U. S. 676.

Such purchaser pendente lite with knowledge of the equities is bound by the suit; and as to land, writ of possession may be issued against it though he is not a party to the suit.

Mullen v. Moline Iron Co., 131 U. S. 371.

Union Tr. Co. v. So. Etc. Imp. Co., 130 U. S. 565.

Warren v. Marcy, 97 U. S. 96.

Tilton v. Cofield, 93 U. S. 163.

Terrel v. Allison, 88 U. S. (21 Wall) 289.

Walden v. Bodley, 50 U. S. (9 How.) 34.

The purchaser of negotiable security, or the taker of money pending litigation is not affected by constructive notice but is absolutely bound by actual notice of the equities of a suit pending.

Scotland v. Hill, 112 U. S. 183.

III.

CAUSE No. 162 IS ANCILLARY OR AUXILIARY TO CAUSE No. 129.

This cause (No. 162 in the district court; No. 6072 in the C. C. A.; No. 432 here) was an ancillary suit to cause No. 129 in equity in said district court, and the jurisdiction of the district court, regardless of the amount involved, residence or citizenship of the parties, is unquestionable.

Freeman v. Howe, 65 U. S. 24.

Krippendorf v. Hyde, 110 U. S. 276.

Dewey v. West Fairmont Gas Co., 123 U. S. 329.

Rouse v. Letcher, 156 U. S. 47.

Root v. Woolworth, 150 U. S. 401.

White v. Ewing, 159 U. S. 36.

Morgan's Louisiana, etc. Co. v. Texas Cent. R. R. Co. 137 U. S. 201.

Toledo St. L. & K. C. R. R. Co. v. Cont. Tr. Co., 95 Fed. 497.

Lilienthal v. McCormick, 54 C. C. A. 75, 117 Fed 96.

The bill in this case has all the attributes of an auxiliary or ancillary bill, that is to say: (a) it is connected with and grows out of a pending suit; (b) it is a continuation of the original suit; (c) it relates to mat-

ters already litigated between the same parties (petitioner being an attorney of one of the parties and a purchaser or taker pendente lite, as well as a party to cause No. 129 at the time cause No. 162 was filed); (d) it is a bill to enforce an original decree in cause No. 129.

Story's Equity Pleading, 10th Ed. Sec. 389.

IV.

DISCUSSION OF CASES CITED BY DISTRICT COURT IN HIS OPINION HOLDING CAUSE No. 162 NOT ANCILLARY OR AUXILIARY TO CAUSE No. 129.

The district judge in his opinion (R. Page 159) held that this suit was ancillary but that in some respects it was an independent suit and cited the following cases to the effect that the suit although ancillary was original in the chancery sense of the word, and, therefore, occupied the position of an original suit. For the convenience of the court we review the cases cited by Judge Holmes as follows:

Bowen, Rec. v. Christian, 16 Fed. 729.

Shainwald v. Davis, 69 Fed. 701.

Richardson v. Loree, 94 Fed. 375.

Pac. R. R. Co. of Mo. v. Mo. Pac. Ry. Co. 111 U. S. 522

Minn. Co. v. St. Paul Co., 2 Wall 609.

Pac. R. R. Co. of Mo. v. Pac. Ry. Co., 1 McCrary 647 (3 Fed. 772).

The above cited cases show the following:

Bowen vs. Christian, 16 Fed. 729 was a case wherein substituted service was sought on a non-resident plaintiff not then in the district. No personal service was gotten.

Shainwald vs. Davis. 69 Fed. 701 was another case of substituted service seeking to making a non-resident a new party to a suit by service of process upon a law firm resident in the district retained by him.

Richardson vs. Loree, 94 Fed. 375 was a case where complainants, not parties to the original suit, sought to set aside by original bill judgments obtained in the same court as having been obtained fraudulently. The bill was demurred to and a demurrer was filed. During the trial of the demurrer the transcript of the case in which the judgments were sought to be set aside was considered by the court and when the case was appealed without motion for writ of certiorari the printed argument suggested that the court of appeals could not properly decide the case without the record. The court of appeals reversed the case but in doing so stated that the bill filed below was an original bill although ancillary and that on the trial of the demurrer the facts stated in the bill were taken to be true, but that the demurrer could not make the transcript or any other evidence a part of evidence in the hearing on demurrer in the lower court. No evidence was introduced, of course, since hearing was on demurrer. No question arose as to service of process.

Pac. R. R. Co. of Mo. v. Mo. Pac. R. R. Co. 111 U. S. 505-22 was a case which did not involve service of process within or without the district but was another case where an original bill was filed to set aside judgment in a former case in the same court on account of fraud which was demurred to and this court held that on demurrer the record of the former suit could not be referred to, but that the charges of fraud in the bill were sufficient to warrant the discovery and relief.

This court in the above case referred also, and cited, the following cases: **Minn. Co. v. St. Paul Co., 2 Wall. 609; Pac. R. R. Co. vs. Mo. Pac. R. R., 1 McCrary, 3 Fed. 772.** Upon examination of these two cases it is found that the Minn. Co. case, supra, was a bill to foreclose a mortgage which was demurred to. The opposition to the jurisdiction of the court both as to citizenship of the parties and the ancillary or auxiliary jurisdiction was overruled. This court held that the bill stated a case for relief and the lower court's action sustaining the demurrer was reversed. There was no question involving the service of process in or out of the state.

The latter case of **Pac. R. R. Co. v. Mo. Pac. R. R. 1 McCrary, 3 Fed. 772** was a case decided in the circuit court of Missouri in 1880. This case did go off upon a motion to vacate service of process but it appears that the processes were by substituted service on citizens in foreign jurisdiction, being in foreign jurisdiction at the time the service was gotten upon them. Chief Justice Miller held that the processes in those cases were not properly issued or served. The case has no bearing on the present controversy.

We do not quite follow the reasoning of the district judge in the citation of the above authorities but suppose that he cited them as authorities to sustain the position that although the court might have had jurisdiction of petitioner in cause No. 129, yet cause No. 162 was in a sense an original cause, though in another sense ancillary, and that the jurisdiction of the court in cause No. 162 would be as in an original suit without reference to cause No. 129. Since his decision was founded on entirely another point we cannot see the applicability of the cases.

V.

SINCE PROPERTY TAKEN PENDENTE LITE BY PETITIONER WAS IN GREMIO LEGIS IN CAUSE No. 129 THE SAME COURT SHOULD DECIDE QUESTIONS CONCERNING ITS TRANSFER, AND NOT THE COURT OF THE RESIDENCE OF PETITIONER.

Ill. Steel Co. v. Putnam, 66 Fed. 517

Adams v. Merc. Trust Co., 66 Fed. 620

> "The court which first acquires the lawful jurisdiction of specific property by the seizure thereof, or by the due commencement of a suit, from which it appears that it is, or will become, necessary to a determination of the controversy involved, or to the enforcement of its judgment or decree therein, for the court to seize, to charge with a lien, or to exercise other like dominion over it, thereby withdraws that property from the jurisdiction of every other court so far as necessary to accomplish the purpose of the suit, and entitles that court to retain the control of it requisite to effectuate its final judgment or decree therein free from the interference of every other tribunal."

Long v. Choctaw Okla. Co., 160 Fed. 365

Re: Insurance Corporation v. Mutual Insurance Co. (C. C. A. 5), 45 Fed. (2) 593

Ward v. Foulkrod, 264 Fed. 630

Sharp v. Bonham, 213 Fed. 667

It is not necessary that a court should have actual possession of the res in order for its jurisdiction to preclude other courts from interference therewith, but if the

cause looks to the final necessary possession of the res by the court its jurisdiction is exclusive.

Kline v. Burke Construction Co. 260 U. S. 226

In the above case, speaking of the conflict of jurisdiction between the state court and federal court, Mr. Justice Sutherland said, at Page 231:

> "It is settled that when a state court and a court of the United States may each take jurisdiction of a matter, the tribunal whose jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed and the jurisdiction involved is exhausted * * * The rule is not only one of comity, to prevent unseemly conflicts between courts whose jurisdiction embraces the same subject and persons, but between state courts and those of the United States it is something more. 'It is a principle of right and law, and therefore of necessity. It leaves nothing to discretion or mere convenience.' Covell v. Heyman, 111 U. S. 176. The rule is not limited to cases where property has actually been seized under judicial process before a second suit is instituted in another court, but it applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in all suits of a like nature. Farmers Loan & T. Co. v. Lake St. Elev. R. Co., 177 U. S. 51; Merritt v. American Steel Barge Co., 79 Fed. 228. The rule is limited to actions which deal either actually or potentially with specific property or objects"

Harkins v. Brundage, 276 U. S. 36

Palmer v. Texas, 212 U. S. 118

Heidretter v. Elizabeth Cloth Co. 112 U. S. 294

The jurisdiction of a court over a subject or a cause, once lawfully acquired, includes the power to enforce its

judgment or decree, and to protect the title of those holding under it from every attempt to avoid or annul it.

Chicot Co. v. Sherwood, 148 U. S. 529

Julian v. Central Tr. Co. 193 U. S. 93

Wabash R. R. Co. v. Adelbert College, 208 U. S. 38

Metcalf v. Barker, 187 U. S. 165

VI.

DISCUSSION OF CASES UPON WHICH PETITIONER BASES HIS PRIVILEGE FROM SERVICE.

The privilege or immunity from service of process claimed by the petitioner in the lower court was founded upon the following cases:

Page Co. v. McDonald, 261 U. S. 496

Stewart v. Ramsey, 242 U. S. 128

Durst v. Tautges, etc. 42 Fed. (2) 507

Reed v. Neff, 207 Fed. 890

Higgins v. Cal. Prune Co. 282 Fed. 550

Central Trust Co. v. Milwaukee R. R. Co. 74 Fed. 442

Kinne v. Lant, 68 Fed 436

Hale v. Wharton, 73 Fed. 739

An examination of these cases will show that in not a single instance was there involved the question of interference by the defendant with the subject matter involved in the suit both which he was attending and in which he was served. As we have stated heretofore in this brief we admit the existence of the privilege for the benfit of a suitor, a witness, and in some cases of an attorney who is a

non-resident and who may be attending court in a foreign jurisdiction at the time of the service of the writ, but we deny that such a rule is "inflexible" and "inviolable."

In the **Page Co. v. McDonald** case, **supra,** Mr. Justice McKenna states that privilege from service on behalf of a non-resident attending court is a privilege of the court rather than the person, his statement being:

> "It is the privilege of the court, we have seen, rather than his. It is founded upon the necessity of the judicial administration."

In the **Stewart v. Ramsey** case, **supra,** Justice Pitney says:

> "The privilege which is asserted here is the privilege of the court, rather than the defendant. It is founded in the necessities of the judicial administratiton, which would be often embarrassed and sometimes interrupted if the suitor might be vexed with process while attending upon the court for the protection of his rights, and the witness while attending to testify. Witnesses would be chary of coming within our jurisdiction, and would be exposed to dangerous influences if they might be punished with a law suit for displeasing parties by their testimony; and even parties in interest, whether in the court or not, might be deterred from the rightfully, fearless assertion of a claim, or the rightfully, fearless assertion of a defense, if they are liable to be visited on the instant with litigation from the defeated party."

The history and development of the rule of privilege is stated further very clearly in the following cases, among others:

Hale v. Wharton, 73 Fed. 739.

Parker v. Marco, 136 N. Y. 585

Brooks v. State, 3 Boyce (Del.) Page 1, Ann Cas. 1915, A, 1133.

In the case of **Brooks v. State, supra,** Judge Wooley states the basis of the rule as follows:

"The privilege arises out of the authority and dignity of the court, it is founded on the necessities of judicial administration, it has for its primal object the protection of the court and not the immunity of the person, and is extended or withheld only as judicial necessities require. Year Book, 20 Henry VI. 10; Bacon's Abr. 'Privilege' B. 2; Sellon's Pr. 126; Tidd's Pr. 196; Starret's Case, 1 Dall. (Pa.) 357, 1 U. S. (L. Ed.) 174; Hurst's Case, 4 Dall. 387, 1 U. S. (L. ed.) 878; Brooks v. Patterson, 2 Johns. Cas. (N. Y.) 102; Parker v. Hotchkiss, 1 Wall. Jr. 269, 18 Fed. Cas. No. 10,739; Halsey v. Stewart, 4 N. J. L. 366; Bridges v. Sheldon, 7 Fed. 17, 43; Larned v. Griffin, 12 Fed. 590; Nichols v. Horton, 14 Fed. 327, 329, 330; Hale v. Wharton, 73 Fed. 739, 740, 741; Central Trust Co. v. Milwaukee St. Ry. Co. 74 Fed. 442; Person v. Grier, 66 N. Y. 124, 23 Am. Rep. 35; Matthews v. Tufts, 87 N. Y. 568; Mulhearn v. Press Publishing Co. 53 N. J. L. 153, 156, 21 Atl. 186, 11 L. R. A. 101."

At common law it was the habit of courts to issue writs of protection to suitor or witness attending court from a foreign jurisdiction.

Parker v. Marco, 136 N. Y. 585.

In view of the above decisions, and the history and development of the rule it appears that the claim of privilege is dependent entirely upon the circumstances surrounding the litigation and whether or not the privilege is consonant with public policy and the protection of the court's authority.

VII.

CLAIM OF PRIVILEGE NOT APPLICABLE WHERE CONTROVERSY IS WITH REFERENCE TO SUBJECT MATTER IN GREMIO LEGIS AND WHERE OFFICER OF THE COURT HAS TAKEN SUBJECT MATTER IN LITIGATION.

There can be no doubt that petitioner's client, if she were non-resident, could not claim to occupy any such position as he is attempting to occupy as her attorney. Is not the attorney for a client so identified before the court in the particular case in which his client is involved that he stands in his client's shoes? Can he in representing his client in any particular case do anything with reference to the subject matter of the suit which that client himself could not do? Is he not the alter ego of the client? Is not he in fact a privy or practical party to the suit, whether he be resident or non-resident? If he be before the court cannot the court compel him to return any subject matter of the litigation by him received while in process of administration by the court? The counsel in the case is a part of the machinery of the court, an officer of the court. He owes duties as prescribed by the judicial decisions not only to his client but to the court and his adversary. He is, while trying a case, as much "in court" as his client. He is the medium through which the court communicates with a litigant and through which the litigants communicate with each other. He is in no position to dispose of any of the property in litigation and thereafter plead to the jurisdiction of the court over his person. By his very presence in court he has submitted himself to the jurisdiction of the court.

In other words, as we have heretofore stated in this brief, in this case two rules of law come in conflict; both rules of law being prescribed for the benefit of the court and not of the person; both founded in the necessity of judicial administration; one the rule that the court must

be protected in its jurisdiction of persons whether they be litigants, witnesses, or attorneys attending court in a foreign jurisdiction, and the second, that all subject matter of the litigation of which the court has acquired lawful jurisdiction, or the power to seize, to charge with a lien, or to exercise like dominion over is thereby withdrawn from the jurisdiction of every other court so far as necessary to accomplish the purpose of the suit, and entitles that court to retain control of the property requisite to effectuate its final judgment or decree.

Both of these rules are rules of law and are, therefore, supposed to be founded on reason, equity and justice. They were both promulgated by the various courts throughout the years for the protection of the jurisdiction of the court and in obedience to an effort to preserve the dignity of the court. Where the two rules conflict the court must enforce that rule which best preserves the power, authority, and dignity of the court.

The result of the holding of the district court if allowed to stand would be that more than two years had been spent in litigation over property then in the constructive possession of the court and upon a final decision of the case a great part of the trust property has been diverted and the merits of the diversion can only be tried in the court of the residence of one of the attorneys of the case who took a part of the funds pendente lite and who claims the privilege of being sued in his own district. Such a procedure would involve the transcript or transfer of hundreds of pages of records, testimony, accounts, pleadings and proceedings, which have been used in the district court which had the jurisdiction of the original suit, to another court for an endless chain of litigation.

The cases are few which illustrate the idea we have in mind for the reason, we suppose, that such a privilege has not often been set up in such a state of case. We cite

the following cases which while not in point exactly, nevertheless bear on this particular question, to-wit:

Nichols v. Horton, 14 Fed. 327

In the above case a writ of attachment was issued in Almstead County, Minnesota, by non-resident and certain personal property taken into possession by the sheriff. While the plaintiff was in the State of Minnesota temporarily attending to his suit of attachment he was sued for damages for the wrongful suing out of the attachment. Upon removal to the District Court of the United States and on motion to quash the service Judge Shiras held that although the defendant was in attendance at court in a foreign jurisdiction that nevertheless the wrong complained of was done during such attendance and that, therefore, the privilege did not apply. In his reasoning he says:

> "Suppose a party or witness comes from a distant state, or possibly from a foreign country, to attend upon a trial and while on his journey he commits a wrong, is the party thus injured obliged to submit to the wrong and postpone the action for the bringing of his litigation until the wrong doer has returned to his home, which may be in a foreign country, or if in the United States may be so far distant as to practically defeat all remedy if the injured party is obliged to follow him to his home?"

Iron Dyke Copper Mining Co. v. Iron Dyke Railroad Company, 132 Fed. 208.

The above case was one from the Circuit Court, District of Oregon, decided August 4, 1904. The defendants entered a plea of special privilege and motion to quash the service upon them, on the ground that their presence within the jurisdiction at the time of service was to attend the foreclosure of a mortgage in the state court. The dis-

trict judge held that since it appeared on the hearing of the motion to quash that the defendants were engaged in wrong doing in reference to the subject matter about which the suit was filed; that they were not entitled to claim the privilege, saying:

> "It is self-evident that an actionable wrong cannot exempt a party from service in an action in respect to it."

Livengood v. Ball, 162 Pac. 768, L. R. A. 1917, C. 905.

The above case is one from the Oklahoma Supreme Court. The defendants were in attendance upon the district court of Oklahoma County at the trial of a case when they were served with summons and claimed their exemption by motion to quash the service upon the ground of privilege while attending court in a foreign jurisdiction. The privilege was denied because of the fact that the plaintiffs were entitled to recover usury of the defendant by a separate action which usury was involved in the cause in which the defendants were then upon attendance. The Oklahoma court cites among others the following cases to sustain its position.

> "Bishop v. Vose, 27 Conn. 1; Mullen v. Sanborn, 79 Md. 364, 25 L. R. A. 721, 47 Am. St. Rep. 421, 29 Atl. 522; Capwell v. Sipe, 17 R. I. 475, 33 Am. St. Rep. 890, 23 Atl. 14; Baldwin v. Emerson, 16 R. I. 304, 27 Am. St. Rep. 741, 15 Atl. 83; Baisley v. Baisley, 113 Mo. 544, 35 Am. St. Rep. 726, 21 S. W. 29; Guynn v. McDaneld, 4 Idaho, 605, 95 Am. St. Rep. 158, 43 Pac. 74; Tidemann v. Tidemann, 35 Nev. 259, 129 Pac. 313; Nichols v. Horton (C. C.) 4 McCrary, 567, 14 Fed. 327; Iron Dyke Copper Min. Co. v. Iron Dyke R. Co. (C. C.) 132 Fed. 208."

Rizo v. Burruel, 202 Pac. 234; 19 A. L. R. 823

The above case holds that one coming into the jurisdiction to prosecute habeas corpus proceedings to secure the custody of his child is not entitled to any immunity from process, served upon him within the jurisdiction, of a petition by the custodian to adopt the child.

Tiedemann v. Tiedemann, 35 Nev. 259
129 Pac. 313.

In the above case the court held that immunity from being sued could not be claimed by a non-resident when within the jurisdiction on matters affecting the same correlated subject matter, and the action is brought in good faith and calls for the adjudication of substantial rights.

Certainly the rule of immunity from service of process in favor of a suitor, witness, or attorney attending court in the jurisdiction other than that of his residence ought not to extend to process in an action or proceeding involved or connected with the subject matter of the litigation during attendance upon which the non-resident suitor is served.

Mullen v. Sanborn, 79 Md. 364; 25 L. R. A. 721

The above case held that if a non-resident voluntarily appeared in the courts of Maryland for the purpose of suing out an attachment for fraud against a citizen there and gives bond, but the attachment is quashed, he is not exempt from the service of a summons issued to bring him into court to respond in damages for the wrongful and malicious issuing of the attachment when he comes into the state, after the quashing of the attachment and for the purpose of testifying in the main action.

First Nat. Bk. v. Di Martino, 180 App. Div. 750
168 N. Y. Supp. 310

The court says in the above case:

> "It would be absurd to say that a person within this state, as a party or a witness, could not be served with process in an action brought in respect to a wrong which said person committed while thus here."

The case of the **Page Co. v. McDonald, 261 U. S. 496** is not in any way in conflict with any of the above cases. The suit there was not in reference to property, the subject matter of litigation, nor was it filed as an ancillary or auxiliary proceeding in the same court in which the non-resident was engaged in litigation and attending court. Also there does not seem to have been any evidence introduced before the district court as to the truth or falsity of the alleged libel for which the damage suit was brought.

VIII.

ISSUES BEFORE THE DISTRICT COURT ON MOTION TO QUASH

The service in this cause (No. 162) was contested in the district court by motion to quash. Since the immunity claimed did not appear upon the face of the pleading, but was set up by affidavit, the privilege should have been set up by special plea.

Equity Rule Twenty-nine.

Arneson v. Denny, 25 Fed. (2) 988.

Desert King Co. v. Wedekind, (C. C. A.) 110 Fed. 873

In law cases the procedure is in accordance with the practice grown up in the federal court relative to the hearing on motion to quash service.

Meisukas v. Greenough Red Ash Coal Co. 244 U. S. 54.

The evidence before the court on the motion to quash on behalf of the petitioner was as to the existence of the privilege, i. e., that the defendant was under process in cause No. 129 and was attending court in cause No. 129 at the time of the service of the writ in cause No. 162 upon him, and on behalf of the respondent to the effect that the subject matter of the litigation in cause No. 129 had been received by the petitioner during the progress of cause No. 129 with full knowledge upon his part of the equities; that a question had arisen with reference to his right to receive and hold said money that an accounting was prayed for in this ancillary bill; all the surrounding circumstances of cause No. 129 were introduced in the evidence before the court and there were no questions of fact for the court to decide. The facts were all admitted. The applicability of the law to the facts was the only issue. The respondent introduced in the lower court the pleading of petitioner in cause No. 129 wherein he admitted the receipt of the money and attempted to exonerate himself (R. Page 136); introduced the decree showing the holding of the court, that the money was trust funds (R. Pages 78-94). Thereupon the lower court did not attempt to hold that any of the facts were untrue, or that the allegations of the bill were insufficient, but merely stated (a) that petitioner was entitled to the privilege, and (b) that the suit No. 162 was not ancillary to cause No. 129 in the sense that the record therein was before the court. This was unnecessary since the actual record in cause No. 129 was introduced in the evidence on the motion to quash.

The decision of the district court is not supportable by the authorities either cited by him or found in the books. The question before the district court was whether or not the jurisdiction of the court over

the property involved in cause No. 129 should control as against the privilege of petitioner against the service of process on him while attending court in that cause, and while a party and under process in that cause.

The Circuit Court of Appeals in its opinion delivered through Judge Dawkins (R. Page 169) set forth the facts exactly as they were before the lower court but drew a different conclusion from the district judge in applying the law to the facts, and holds that to allow the privilege or immunity claimed by a non-resident attending court, either under process or as an attorney, to defeat proper process from the same court for the control of the same property would be to destroy the very basis of the rule itself, i. e., the orderly functioning of the court.

The district court did not attempt to give its opinion as to whether on the merits the petitioner on the facts shown had a right in law to withdraw from the corpus of the estate $70,000.00 of the funds, whether as fees, or otherwise. That question, of course, would come up on the merits. On the motion to quash the facts stated in the pleadings would, under ordiniary circumstances, be taken as true, but this assumption was not necessary in this case since the facts themselves were in evidence before the lower court, and it was only necessary that it should say whether the rule of personal privilege of an attorney or party under process attending court was inflexible to such an extent that if while acting as attorney and attending court, he should, pendente lite, take a portion of the subject matter of the litigation, the parties to the cause must be referred to the court of the residence of such attorney.

IX.

REPLY TO PETITIONER'S BRIEF ON THE MERITS.

The brief thus far has been written without advantage of having brief on the merits for petitioner before us. That brief only arrived today, (January 4, 1932) and, therefore, we have only time to refer to the same insofar as may be necessary to call attention to the errors in argument and reasoning indulged in by counsel for petitioner.

Under Paragraph 3, Pages 10-12, (and especially by foot note on Page 12 in said brief) counsel for the petitioner, contend that petitioner's evidence in the lower court, i. e. his affidavit, showed why and how he took the money in dispute as fees, etc., and should have been accepted by the district court as true and final and all the other evidence disregarded and thus the case should have been tried by the district court on the merits instead of on the motion to quash the service. Counsel quotes from the statement of Justice McKenna in the case of

Page Co., v. McDonald, 261 U. S. 449

to the effect

> "Besides, it cannot be assumed, as plaintiff in error does, that the pleading in her suit against plaintiff in error were final and a tort, and on that assumption deny her the immunity to which she is entitled. The truth or falsity of pleadings is not to be assumed, it is to be established."

We venture to say that by this statement Justice McKenna did not mean to say that on the motion to quash it was necessary that a complete trial should be had on the merits of Mrs. McDonald's case before the immunity would be denied. We suggest that it was meant by that statement that on a motion to quash sufficient evidence should be introduced before the court to show that there was a serious question of fact involved which would if true, in effect, destroy the claim to privilege. We have stated in this brief heretofore at page 8 hereof exactly what evidence was before the district court on the motion to quash and will not again go over it. Suffice it to say

that there was more than sufficient in that evidence, the pleadings and the answer of Lamb (which was introduced as a part of the evidence) to show (1) an admission of the taking of the funds, a part of the subject matter of the litigation in cause No. 129, and (2) to show the court that it should not have released its jurisdiction of either the fund or the taker.

Counsel state in the footnote on Page 27 of their brief on the merits that at the time of the taking of the funds in Cause No. 129 there was only about $132,151.05 of judgment claims intervened in the original proceeding, and therefore, it is inferred, enough of the estate left for Mr. Lamb to properly take his fees. Counsel forget that the Government had intervened and had pending during all this time a claim of $681,163.40. (Intervention by the Government December 17, 1928. See R. Page 123. Lamb answer.) There is the further serious legal proposition as to whether or not under the circumstances, thoroughly familiar with all the pleadings, the petitioner did not know that at that time more than $7,000,000.00 of creditors were seeking admission to the case, and were proceeding at law during all this time (cases being defended by petitioner) to secure their judgments for intervention. The simple statement by the petitioner that he in good faith received about one-third of the estate during litigation as a fee does not entirely dispose of the merits of the controversy. There arises the question (1) as to whether or not this fee was justified; (2) as to whether it was actually fees or not; (3) whether or not during the progress of litigation attorneys may completely eliminate the subject matter in litigation by a charge of fees therein. It appears to us that all these questions are for trial on the merits.

Counsel state at Page 15 of the brief on the merits that the decree in cause No. 129 appears to have been a consent decree, or a compromise, and that obviously the same is not binding upon Lamb. We do not see the applicability of these remarks in this case, but refer the court to our brief on the merits in cause No. 432 where the

question of consent decree is discussed in reply to petitioner's brief on the merits. Even if the decree in cause No. 129 had been an absolute compromise, which is not true, it would not have settled supplementary proceedings in reference to the estate. We have cited cases in our brief in No. 432 at Page 30 thereof showing that the settlement, or not, of the main proceeding has nothing to do as a rule with supplementary proceedings such as this one, or the review thereof.

The decree in cause No. 129 was not a consent decree in the sense that it disposed of the supplemental proceedings, nor has it been mentioned that the decree was only consented to in the matter of form, exemptions allowed, etc. The district court had finally delivered his opinion in the case finding for the plaintiffs as to all matters of fact and law, and this opinion though not in the record was before the court in the record in cause No. 129. But for the entry in the decree of the clause that the petitioner should not be prejudiced thereby he would have been absolutely bound by the decree as a taker pendente lite.

In this regard see report of Committee on Professional Ethics and Grievances Concerning Matters of Professional Conduct of the American Bar Association cited in full in our brief in cause No. 432 at Page 46 thereof where it is held by the Committee that an attorney taking a part of the property in litigation pendente lite, as fees, takes same subject to rights of the parties in the main cause.

CONCLUSION

We submit that the decision of the Circuit Court of Appeals in this cause is correct both on the law and the facts, and should be affirmed by this court.

Respectfully submitted,

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